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## Who Makes Our Laws – Brussels, Westminster or Holyrood?

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*Questions around sovereignty and the extent of the impact of EU law on the UK and Scotland have been central in the EU referendum campaign, writes Tobias Lock. He argues that the policy areas which EU law covers is more significant than the quantity of legislation, and that EU law has only a minimal role in the most salient issues of public policy.*

Arguments around sovereignty are at the heart of the debate on whether the UK should leave the EU. Those advocating a 'Leave' vote on 23 June contend that many laws applicable in Britain are not made by directly elected and fully accountable MPs and MSPs, but by unelected and unaccountable bureaucrats in Brussels. Leaving the EU would, in their eyes, enable Britons to take back control of their own destiny.

By contrast, those arguing to stay in the EU point out that Britain has not lost sovereignty, but instead shares it with other Member States. They also highlight the necessity to have some common regulation in a common market and the role played by the directly elected European Parliament and by accountable national ministers voting on laws in the Council of the EU. So, who makes our laws – Brussels, Westminster or Holyrood? The short answer is that they all do. In what precise fields and to what extent depends upon the competence that each entity – Scotland, the UK and the EU – has.

### Parliamentary Sovereignty as a Starting Point

It is best to start with the parliament at Westminster, which is sovereign. In the words of the famous Victorian constitutional lawyer A. V. Dicey this means that Parliament has 'the right to make or unmake any law whatever'. This means that, in theory, Westminster can legislate on any matter and in whichever way it pleases.

However, Parliament decided to limit its own powers in two ways. First, by passing the European Communities Act 1972 and thus allowing for EU law to be applicable in the United Kingdom. Second, by devolving certain powers to Scotland, Wales, and Northern Ireland.

Parliamentary sovereignty means that Parliament can take these powers back whenever it so chooses. However, there may be a legal and political price to pay. Repealing the European Communities Act 1972 would be in breach of the UK's obligations under the EU treaties (as long as the UK remains a member of the EU).

Repealing devolution legislation would be politically extremely unpopular in the different parts of the UK. It might well lead to renewed calls for independence, particularly in Scotland.

### Who Does What?

The EU is governed by the principle of ‘conferral’. This means that it can legislate only on those questions that the Member States gave it power to legislate on. The EU’s powers are therefore based on an exhaustive list of competences.

Some of these are exclusive, which means that the Member States are prevented from legislating on a specific point. Examples are the rules on customs tariffs, the common commercial policy (ie trade with the outside world) and competition law. Most EU competences, however, are shared with the Member States. This means that the Member States may legislate as long as the EU has not legislated. As soon as (and for as long as) Union legislation has come into existence, the Member States can no longer legislate.

For the EU to be allowed to legislate based on a shared competence, the EU must comply with the principle of ‘subsidiarity’. It needs to show that the objectives of the legislation cannot be achieved by the Member States individually, and that they can be better achieved by way of EU legislation.

An example would be rules on product standards. For products to be traded freely in the Single Market, it is often necessary that there is a common product standard. Otherwise, there might be differing rules in each Member State. This indicates that 28 pieces of Member State legislation cannot achieve the aim of creating a Single Market, and that one piece of EU legislation can do this better. The vast majority of EU legislation is based on shared competences – examples include environmental law, the internal market, agriculture and fisheries, consumer protection and energy.

Under the EU’s ordinary legislative procedure, EU legislation is proposed by the European Commission and then voted on by the European Parliament and the Council of the European Union. The European Parliament is directly elected by the citizens of the EU Member States. Each Member State has a specified number of MEPs, which proportionately decreases with a Member State’s size.

The UK has 73 MEPs, six of whom represent Scotland. The Council of the EU comprises a minister from each Member State. The votes in the Council are weighted to take account of the differences in population between the Member States. The Council usually adopts legislation with a qualified majority. This means that a Member State can be outvoted and legislation can be adopted against its will.

However, in some cases, the Council must vote unanimously (eg when making anti-discrimination law). Sometimes the consent of the European Parliament is not needed, but it is sufficient if it is consulted (eg when laying down the rules on EU citizens’ right to vote in municipal elections).

The remit of Holyrood are defined by the Scotland Act 1998, which has devolved certain powers to Scotland. The Scottish Parliament may legislate in any area that

has not been ‘reserved’ by Westminster. Important powers for the Scottish Parliament include Scots law (criminal and civil, also court procedures), health and education. Westminster can, in theory, legislate in these areas as well, but this is not normally done.

### What Shape and Effect Does EU Law Have?

EU law appears in different guises. There are the EU treaties, which have been agreed by the Member States and ratified by their parliaments. They contain the basic rules of the EU, such as those on the free movement of goods, services, people and capital. Individuals can rely on these rules directly – eg a company based in Edinburgh can provide services in Spain on that very basis and *vice versa*.

Then there is EU legislation, which can take two different forms: first, regulations, which are directly applicable. Their effect is therefore comparable to that of national law. For instance, the regulation on air passenger rights can be directly relied upon by individuals to claim compensation if a flight has been cancelled without good reason.

Second, there are directives. EU directives are not directly applicable, but must be implemented by the Member States through national legislation. In the UK, directives are mostly implemented by way of secondary legislation – so-called statutory instruments made by government ministers and not Parliament.

Directives need implementation because they typically spell out the aim of what needs to be achieved, but leave the question on how this is achieved to the Member State. This allows Member States to update and adapt existing legislation and thus integrate EU law into their legal system.

For instance, the Working Time Directive was implemented into UK law by way of the Working Time Regulations. Other directives have been incorporated into Acts of Parliament. For example, the EU’s anti-discrimination directives were incorporated into the Equality Act 2010.

### How Much Does EU law Constrain Westminster and Holyrood?

EU law takes primacy over conflicting national law. This means that neither Westminster nor Holyrood are allowed to legislate contrary to European Union law. For Holyrood, this is expressly laid down in the Scotland Act, which stipulates that an Act of the Scottish Parliament is *ultra vires* (and therefore not law) if it is not compliant with EU law.

For Westminster, it follows from the case law of the European Court of Justice and of the UK’s highest court (formerly the House of Lords, now the Supreme Court) that, so long as the European Communities Act 1972 is in force, Acts of Parliament must not contradict EU law. If they do, they are deemed inapplicable insofar as the contradiction exists.

It follows from this that both Holyrood and Westminster are best advised not to legislate in a way that is contrary to EU law. In this sense, the influence of EU law

goes further than the division of competences would suggest. Even where Westminster or Holyrood have legislative competence, that competence must be exercised within certain limits set (mainly) by the EU treaties.

For instance, Holyrood would not be allowed to pass legislation on education that discriminates against EU nationals. As a consequence, people from other EU Member States studying at Scottish universities cannot be charged higher university fees than Scottish students, as this would discriminate against them on the basis of their nationality. This would be clearly prohibited by EU law.

Another example would be Westminster legislating stricter standards for animal welfare than required by EU legislation. Stricter standards are allowed, but they must not be used to prevent, for example, meat that was produced in accordance with (lower) EU standards from being imported into the UK. If Westminster legislation prevented such imports, it would contravene EU law and would have to be disapplied as far as producers from outside the UK are concerned. It could be applied, however, to British producers.

### **What Proportion of Our Laws Are Made in Brussels?**

Having established that some of our laws are made in Brussels, some in Westminster, and some in Holyrood, an important question remains: how much of our law is made by the EU? It has proven difficult to put an exact number on this. The (politically independent) House of Commons Library suggests that, in the period from 1997 to 2009, 6.8 per cent of Acts of Parliament and 14.1 per cent of statutory instruments had a role in implementing EU law.

These numbers do not present a complete picture, however. On one side, they say very little about the extent to which these pieces of legislation are determined by EU law. For instance, an Act of Parliament might be used to implement an EU directive, but it might additionally deal with a large number of issues that have nothing to do with EU law. Conversely, a statutory instrument might do nothing but 'copy and paste' an obligation under EU law into UK law. So, the influence of EU law on British law might be less than the numbers suggest.

On the other side, however, these numbers do not take into account directly applicable EU law at all. There are thousands of EU regulations in force and the EU treaties themselves create some directly effective law. At the same time, not all EU regulations in force affect the UK – eg EU rules on olive farming are not relevant here. Moreover, these numbers say nothing about the extent to which the legislators in Westminster and Holyrood are constrained by EU law.

In addition, while these figures may give us an idea of the quantity of EU laws in place, they say very little about the qualitative impact these rules may have on sovereignty. Many of them are purely administrative or technical rules – eg on the exact conditions under which farming subsidies are paid.

This consideration strongly suggests that not all laws are of equal importance. Arguably, criminal law or tax law are more important to people's daily lives than rules concerning the interoperability of rail systems. If the UK were not a member

of the EU, such rules would most likely be made by Whitehall ministries or the Scottish Government instead of Brussels.

### Assessment: Quality is More Important than Quantity

It is difficult to say with precision to what extent the UK has handed sovereignty over to the EU. One indication of the importance of legislation might be people's responses to what they consider 'the most important issues' facing the UK.

In February 2016 – the time of writing of this contribution – the top ten according to an Ipsos/MORI poll were immigration, healthcare, the economy, Europe, housing, education, unemployment, defence/foreign affairs/terrorism, inequality and crime (in this order). Apart from immigration – where European law makes it almost impossible to deny a worker from another EU Member State to take up a job in the UK – and the obvious 'Europe', none of these issues are directly related to European law-making.

The EU has very little or no legislative competence in the fields of healthcare, economic policy, housing, education, unemployment, defence or foreign affairs and crime. Admittedly, EU law may constrain national law-making in these fields, but does not replace it. Of course, EU law may be relevant indirectly. For instance, the EU has powers to pass anti-discrimination legislation, which might help to alleviate inequality.

On the other hand, proponents of the campaign to leave the EU would argue for instance that high levels of immigration lead to housing shortages and are thus closely connected. They might also argue that EU rules negatively affect the economy. But looking at the quality rather than the quantity of EU laws and how they affect day-to-day life in Britain, it is fair to conclude that laws made in Brussels have some impact in the UK, but that the UK (and Scotland) have by no means completely surrendered all law-making powers to the EU.

*This article, co-published with the [Centre on Constitutional Change](#), draws from the e-book [Britain's Decision – Facts and Impartial Analysis for the EU Referendum](#).*

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